Supreme Court, U.S.
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No. 96-1074

In The

Supreme Court of the United States

October Term, 1996

FRED DAVIS,

Petitioner,

vs.

HANOVER INSURANCE COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

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RESPONDENT'S OBJECTIONS TO THE ISSUES PRESENTED FOR REVIEW

The Petitioner, in his Petition for Writ of Certiorari, has purportedly presented eleven issues for this Court's consideration. (Pet. at i-iv) The Respondent, as will be detailed more fully below, objects to several of the issues presented for the following reasons:

1. Issue I is objectionable on the grounds that the Petitioner did not raise in the courts below an alleged violation of the Massachusetts Declaration of Rights.
2. Issue II is objectionable on the grounds that the Petitioner did not allege a violation of Amendment V of the United States Constitution in his complaint or at the United States District Court in opposition to the Respondent's Motion to Dismiss. Additionally, the issue presented does not comply with Rule 14 of the Supreme Court Rules.
3. Issue III does not state a question for consideration, in violation of Rule 14 of the Supreme Court Rules.
4. Issue IV is objectionable on the grounds that the Petitioner did not raise in the courts below any alleged violation of the Massachusetts Civil Rights Act, M.G.L. ch. 12., s. 11 I and no question for consideration is presented, in violation of Rule 14 of the Supreme Court Rules.
5. Issue V is objectionable on the grounds that the Petitioner did not raise in the courts below any alleged violation of Article XI of the Massachusetts Declaration of Rights, and no question for consideration is presented in violation of Rule 14 of the Supreme Court Rules.
6. Issue VI fails to comply with Rule 14 (1) (a) of the Supreme Court Rules in that it does not express concisely a question presented for review nor was this

RESPONDENT'S OBJECTIONS TO THE ISSUES PRESENTED FOR REVIEW – Continued

alleged issue presented to the United States Court of Appeals.

7. Issue VIII fails to comply with Rule 14 (1) (a) of the Supreme Court Rules in that it does not express concisely a question presented for review.

8. Issue IX fails to comply with Rule 14 (1) (a) of the Supreme Court Rules, rather it simply makes an allegation that counsel for the Respondent acted in bad faith without any suggestion of how this allegation relates to an issue of proper consideration by this Court.

LIST OF INTERESTED PARTIES

The Petitioner is Fred Davis. The Respondents are Hanover Insurance Company and John F. O'Brien.

Pursuant to Supreme Court Rule 29.6, the Respondent supplies the following information concerning the corporate structure of Hanover Insurance Company.

1. The Hanover Insurance Company is a New Hampshire Corporation, with a principal place of business at 100 North Parkway, Worcester, MA, which is wholly owned by Allmerica Property and Casualty Companies, Inc. which is a Delaware Holding Company, with a principal place of business at 440 Lincoln Street, Worcester, MA.

2. Allmerica Property and Casualty Companies, Inc. is publicly traded on the New York Stock Exchange.

3. Allmerica Financial Corporation is a Delaware Holding Company, with a principal place of business at 440 Lincoln Street, Worcester, MA.

4. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange and it is the indirect parent company of Allmerica Property and Casualty Companies, Inc. and Citizens Corporation, which is a Delaware Holding Company with a principal place of business at 440 Lincoln Street, Worcester, MA.

5. Citizens Corporation is publicly traded on the New York Stock Exchange.

6. Allmerica Financial Corporation, through its wholly owned subsidiary First Allmerica Financial Life Insurance Company ("First Allmerica"), a Massachusetts insurer and SMA Financial Corp., a Massachusetts holding company which is a wholly owned subsidiary of First Allmerica, owns 59.47 percent of

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the Common Stock of Allmerica Property and Casualty Companies, Inc.

7. The Hanover Insurance Company owns 82.5 percent of the Common Stock of Citizens Corporation.

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STATEMENT OF JURISDICTION

The Petitioner claims that this Court's jurisdiction "is invoked under 28 United States Code." (Pet., p.2) This assertion of jurisdiction is overly vague and does not comply with Rule 14(1)(e) of the Supreme Court Rules. The Petitioner has failed to identify the particular statutory provision which confers jurisdiction to this Court, rather he has simply mentioned an entire Article of the United States Code, leaving the Respondent to speculate as to the alleged jurisdictional basis for the Petition.

STATEMENT OF THE CASE

The Respondent maintains that many of the allegations contained in the Petitioner's Statement of the Case (Pet., p.2-4) are inaccurate, irrelevant or incomplete. To correct the record, the Respondent provides this Statement of the Case:

On or about January 18, 1990, a civil complaint was filed against Anthony Lauria, the Respondent's insured, on behalf of the Petitioner, by the law firm of Ravech, Aronson & Shuman, P.C. This lawsuit arose out of a motor vehicle accident in which the Petitioner was allegedly injured. On April 26, 1991, the law firm of Ravech, Aronson & Shuman, P.C. withdrew from the civil action and served upon the Respondent a notice of an attorney's lien on behalf of said law firm covering the proceeds arising out of the lawsuit against Mr. Lauria. (Supp. App., p.1) In September of 1991, the Petitioner and the Respondent, through their attorneys, reached an

agreement to dismiss the Petitioner's complaint in consideration of Twenty Thousand Dollars. From that time forward, the Respondent has attempted to tender the settlement funds to the Petitioner, while respecting the attorney's lien served upon it. The Petitioner has rejected every such tender offer, insisting that his prior attorney had no lien on the settlement funds.

On March 10, 1993, the Petitioner filed a civil complaint against the Respondent in the Norfolk County Superior Court, alleging, in essence, that the Respondent improperly insisted on respecting the lien of the Petitioner's prior counsel. (Supp. App., p.2-4)

On March 24, 1993, the Respondent filed its answer to the complaint, along with a counterclaim against the Petitioner, in which it sought to enjoin the Petitioner from continuing his baseless allegations against the Respondent. The counterclaim also sought a declaration that the Respondent was acting properly in respecting the lien of the law firm of Ravech, Aronson & Shuman, P.C. (Supp. App., p.5-8)

On September 24, 1993, the Respondent filed its motion for summary judgment on the Norfolk County Superior Court complaint. This motion did not seek summary judgment on its counterclaim. (Supp. App., p.9-20) On January 14, 1994, after hearing, Judge Connolly allowed the motion for summary judgment. (Supp. App., p.21) Contrary to the Petitioner's allegation that Judge Connolly's order dismissed the counterclaim, no such order was issued by Judge Connolly. The Respondent's counterclaim, therefore, remained active.

According to the Norfolk County Superior Court docket, the Petitioner filed his notice of appeal on January 21, 1994, followed by several motions that the record be assembled for appeal. (Supp. App., p.25-26) All such motions were denied. On September 12, 1995, upon the Respondent's motion, the Norfolk County Superior Court entered a voluntary dismissal of the counterclaim against the Petitioner. Final judgment was then entered on all counts. On October 3, 1995, the Petitioner filed his notice of appeal of Judge Connolly's January 14, 1994 order and the appeal proceeded. (Supp. App., p.22-26) The Petitioner's appeal was subsequently rejected by the Massachusetts Court of Appeals and the Superior Court judgment was affirmed on June 14, 1996. (Supp. App., p.27)

On August 16, 1995, the Petitioner filed a lawsuit in the United States District Court, First Circuit, against the Respondents, Hanover Insurance Company and John F. O'Brien, alleging that the Respondents and the Massachusetts Norfolk County Superior Court judge somehow acted in a manner so as to deny the Petitioner of his right to appeal the Superior Court's January 14, 1994 order.

On September 5, 1995, the Respondent filed a Motion to Dismiss the United States District Court lawsuit on the grounds that the Petitioner had failed to state a claim for relief and that the Court did not have subject matter jurisdiction. On May 17, 1996, the United States District Court allowed the Respondent's Motion to Dismiss. (App., p.3-7) On May 28, 1996, the Petitioner filed his Notice of Appeal of said dismissal. On October 11, 1996, the United States Court of Appeals affirmed the United

States District Court's judgment. (App., p.8-9) On October 24, 1996, the Petitioner filed his Notice of Petition for Writ of Certiorari.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

In his Statement of the Case, the Petitioner alleges that the Respondent's prior attorney, Mark F. Mahnken, threatened the Petitioner. (Pet., p.7) This allegation is untrue and it was never previously made by the Petitioner. It is made at this time for the sole purpose of attempting to create allegations of fact that could somehow legitimize the Petitioner's recently contrived allegation that the Respondent violated the Massachusetts Civil Rights Act.

The Petitioner further alleges that Judge Connolly of the Massachusetts Superior Court dismissed the counterclaim of the Respondent at the time he allowed its Motion for Summary Judgment. (Pet., p.4) This assertion is incorrect, as the records clearly demonstrate. (Supp. App., p.21)

The Respondent also objects to the numerous references to statements made by non-parties to this litigation as the alleged statements are newly created and/or are not corroborated by an affidavit.

ARGUMENT FOR DENIAL OF WRIT

I. THE PETITIONER FAILED TO PLEAD PROPERLY THAT THE FEDERAL COURT HAD JURISDICTION, THEREFORE, THIS COURT SHOULD NOT CONSIDER HIS PETITION.

It is the Petitioner's clear burden to sufficiently plead the jurisdiction of the Federal Court. A complaint which makes no adequate statement of jurisdictional facts is fatally defective. *Ivey v. Frost*, 346 F. 2d 115 (C.A. Mo. 1965):

" . . . proper allegations setting out the federal question must be included in the plaintiff's complaint." 6A Volz, *Federal Practice Manual*, § 7527, at p.313.

It is insufficient that the Petitioner has merely recited in his complaint that the Court's jurisdiction rests, for example, upon the equal protection clause of the United States Constitution (Supp. App., p.28):

> The law, however, is well settled that the mere recitation of a basis for jurisdiction by a party is not sufficient. Rather, substantive details establishing jurisdiction must be alleged in the complaint. *Ellison v. Merit Systems Protection Board*, 7 F. 3d 1031, 1035 (Fed. Cir. 1993).
>
> The general rule for pleading Federal jurisdiction requires more than a simple allegation that jurisdiction exists or citation of a Federal statute. Rather, it is required that the complaint clearly set out the basic facts necessary to support the conclusion that there is Federal jurisdiction. *Fountain v. New Orleans Public Service, Inc.*, 265 F. Supp. 630, 632 (E.D. La. 1967).

> The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule', which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint. *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392 (1986).

See also, *McCoy v. Massachusetts Institute of Technology,* 950 F. 2d 13, 15 n. 1 (1st Cir. 1991).

The Respondent recognizes that a more liberal reading of this pro se litigant's pleadings may apply here. *Haines v. Kerner,* 404 U.S. 519, (1972); *Green v. Commonwealth of Massachusetts,* 108 F.R.D. 217, 218 (D. Mass. 1985). Nevertheless, "this cannot be taken to mean that pro se complaints are held to no standard at all". *Green v. Commonwealth, Id.* The right of self-representation is not a license to violate the procedural and substantive rules. *Faretts v. California,* 422 U.S. 806, 835 n. 46, (1975); cited in *Andrews v. Bechtel Power Corp.,* 780 F. 2d 124, 140 (1st Cir. 1985); see also, *FDIC v. Anchor Properties,* 13 F. 3d 27 (1st Cir. 1994). A court may not take a liberal view of jurisdictional requirements and set a different rule for pro se litigants only. *Kelley v. Secretary, United States Department of Labor,* 812 F. 2d 1378 (Fed. Cir. 1987). Therefore, despite the application of a more liberal rule of pleading, the allegations of the Petitioner's complaint are patently insufficient to support the exercise of subject matter jurisdiction in this matter.

II. THE PETITIONER HAS FAILED TO ESTABLISH A LEGITIMATE EQUAL PROTECTION ARGUMENT

The substance of the Petitioner's complaint is that the Norfolk County Superior Court, allegedly in conjunction with the Respondent's prior attorney, improperly refused to allow the Petitioner to appeal an interlocutory order. Even if this Court were to accept that the Petitioner had properly pled an equal protection jurisdictional basis for this action, it is abundantly clear that the Petitioner's efforts to have the record assembled for his appeal were properly rejected by the Superior Court based upon Rule 54(b) of the Massachusetts Rules of Civil Procedure and Massachusetts General Laws, chapter 231, § 113.

The law in the Commonwealth of Massachusetts is that a party can appeal only a "final judgment of the Superior Court." M.G.L. ch. 231, § 113. A "final judgment" is an act of the trial court that finally adjudicates the rights of the parties affected by the judgment. M.R.C.P. 54(a). A court order which does not resolve all claims, including counterclaims, is not a final adjudication of all rights of the parties affected unless the court makes an express determination that there is no just reason for delay and upon an express direction by the court that final judgment enter. M.R.C.P. 54(b)

Due to the fact that the Respondent's counterclaim had not been acted upon by the trial court when the Petitioner attempted to initiate his appeal, his motions for the immediate assembly of the record were premature. The Petitioner has cited no case law to establish that the Norfolk County Superior Court misapplied the applicable law or the rules of civil procedure in refusing to process

his efforts at an appeal, nor has the Petitioner produced any evidence to suggest that others, situated similarly, had been allowed by the trial court to proceed with an appeal.

Although it is obvious that the Petitioner's attempts to proceed with his appeal were properly rejected by the Massachusetts trial court, even if the court were incorrect, its order would not give rise to federal court jurisdiction. A challenge to an interpretation and application of the rules of procedure does not supply "federal question" jurisdiction. 13B Charles Allan Wright, et al., FEDERAL PRACTICE AND PROCEDURE JURISDICTION (2d ed. 1995), § 3563 (1995 Supp.)

The thrust of the Petitioner's complaint is contained in one sentence:

> "the plaintiff is denied his right to appeal the courts [sic] decision" (Supp. App., p.28)

> The rules, then, only implement the exercise of jurisdiction otherwise conferred by Congress and do not provide an independent basis for parties without any other jurisdictional grant to get into federal court in the first place. *Port Drum Co. v Umphrey,* 852 F.2d 148, 149 (5th Cir. 1988).

As a matter of law, an alleged irregularity in the process for review in a state court does not give rise to federal jurisdiction for a violation of equal protection. *Wagner Electric Mfg. Co. v. Lyndon,* 262 U.S. 226 (1922) (holding directly that the refusal of a state court to transfer an appeal to the state court en banc is not a denial of equal protection).

> The federal district courts have no authority to review as on appeal the actions of a state court because of a claimed violation of constitutional rights. The mere fact that a state court judgment or decision is erroneous, or unjust, or the result of improper practices on the part of one of the litigants, or inconsistent with prior decisions, raises no constitutional question on which the jurisdiction of the federal courts can be based. . . . No federal question is presented by a claim of submitting the matter to the court en banc . . . or that a state appellate court failed to consider an assignment of error. 36 *C.J.S., Federal Courts,* § 28, at p.156-157.

Similarly, a claim that there has been a denial of procedural due process by the granting of summary judgment in a state court (for purposes of invoking federal jurisdiction) is frequently held to be frivolous. *Page v. Work,* 290 F. 2d 323, 334 (9th Cir.) *cert. denied* 368 U.S. 875 (1961); *In the Matter of Georgia Jewelers, Inc., Bankrupt,* 219 F. Supp. 386, 399 (N.D. Ga.), *aff'd,* 302 F. 2d 362 (5th Cir. 1962); *Reynolds v. State of Georgia,* 640 F. 2d 702 (5th Cir. 1981). See also *Lake v. Central Savings Bank,* 27 F. 2d 847 (5th Cir. 1928) (holding that even if the plaintiff can show that the state court failed to pass upon certain grounds in making its decision, this still does not constitute a denial of any constitutional right upon which to base federal jurisdiction).

Most critically for purposes of the Petitioner's equal protection claim is the fact that he has made no allegation that he was treated any differently than any other person similarly situated. He has, therefore, not been "classified"

at all and the constraints of the equal protection clause are simply inapplicable.

"Equal protection" is essentially a directive that all persons similarly situated be treated alike. *City of Cleburne, Texas, v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). The elemental prerequisite to an equal protection analysis is that there be some legislative, administrative, or judicial scheme or some state-promulgated rules which are subject to judicial review. *Doe v. McFaul,* 599 F. Supp. 1421 (D.C. Ohio 1984). The equal protection clause could not be violated by negligence, rather a showing of deliberate and unlawful discrimination is required. *Dudosh v. Warg,* 668 F. Supp. 944, *vacated* 853 F. 2d 917, *cert. denied* 109 S. Ct. 367 (E.D. Pa. 1987).

To establish an equal protection violation, the Petitioner must demonstrate that the challenged action was motivated by an intent to discriminate. *Elston v. Talledega County Board of Educ.,* 997 F. 2d 1394, *rehearing denied* 7 F. 3d 242 (11th Cir. 1994). The burden is on the plaintiff to make this showing of purposeful and unlawful discrimination. *Walters v. City of Allentown,* 818 F. Supp. 855, *aff'd.* 9 F. 3d 1541, *cert. denied* 114 S. Ct. 1301 (E.D. Pa. 1993). The Petitioner has not alleged that he was treated differently than any other persons who were similarly situated before the courts, or that there was some state promulgated scheme, or that any conduct here was motivated by an intent to deliberately and unlawfully discriminate.

> A claim must have a **minimum plausibility** to support jurisdiction, even if it asserts a basis (a deprivation of constitutional rights under color

> of state law) that ordinarily furnishes jurisdiction. *Dozier v. Loop College, City of Chicago,* 776 F. 2d 752, 753 (7th Cir. 1985) (emphasis added).

The Respondent here maintains that the Petitioner's claim has no such "minimum plausibility" nor does any reading of the complaint demonstrate that it "clearly and substantially" involves the Constitution:

> A case arises under the Constitution of the United States if it clearly and substantially involves a dispute or controversy respecting the validity, construction or effect of . . . [the Constitution] . . . which is determinative of the resulting judgment. *Dworkin v. Hustler Magazine, Inc.,* 611 F. 2d 781, 784 (D.C. Wyo 1985).

And further:

> The court will critically examine the averments in the complaint to determine if the federal question pleaded is a real or substantial one or remote or immaterial. If the plaintiff's case concerns federal law only remotely or in an immaterial way, the case is to be dismissed for want of jurisdiction. 6A Volz, *Federal Practice Manual,* § 7530, at p.323; and cases cited.

Where an alleged claim under the Constitution appears to be immaterial and made solely for the purposes of obtaining federal jurisdiction, or where the claim is wholly insubstantial and frivolous, the claim should be dismissed for lack of jurisdiction. *Ortiz De Arroyo v. Barcelo,* 765 F. 2d 275, 279 n. 6. (1st Cir. 1985); citing *Bell v. Hood,* 327 U.S. 678, 682-683, (1946). The instant matter is just such a case.

Even if the complaint is somehow interpreted so as to generally encompass a claim for relief under the equal protection clause, such a claim still will not lie against the Respondents. The protections of the Fourteenth Amendment apply strictly to state action and do not apply to purely private actions. *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976); *Meyer v. Massachusetts Eye & Ear Infirmary*, 330 F. Supp. 1328, 1331 (D. Mass. 1971). Even assuming that the Petitioner has alleged some actionable conduct by either John O'Brien or by Hanover Insurance Company (an assumption which is strongly denied), there is no allegation that any such conduct was governmental in nature.

> This constitutional guarantee [the equal protection clauses of the federal and state constitutions] limits only the actions of government; it does not apply to purely private actions. *Schroeder v. Danielson*, 37 Mass. App. Ct. 450, 456, 640 N.E. 2d 495, 498 (1994).

See also, *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, *aff'd in part, vacated in part*, 855 F.2d 888, *cert. denied* 109 S. Ct. 869 (D. Mass. 1985) (the Fourteenth Amendment protects only against governmental intrusions). Entirely private actions cannot violate equal protection. *Medical Institute of Minnesota v. National Ass'n of Trade and Technical Schools*, 817 F. 2d 1310 (8th Cir. 1987). The Petitioner has not alleged that these private defendants have made the extensive use of state procedures with the overt, significant assistance of state officials as is required by cases such as *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

There is here, perhaps, an analogy to the area of malicious prosecution under state law. A private citizen is not liable for malicious prosecution where he merely relates the material facts to the public officer and leaves the public officer to decide what to do. *Seeling v. Harvard Cooperative Society*, 1 Mass. App. Ct. 341 (1973); *Kidder v. Whitney*, 336 Mass. 307, 308-309 (1957). Even if the prosecutor comes to the wrong conclusion and prosecutes when he ought not to do so, the private citizen who initially brought the charges forward cannot be held liable in an action for malicious prosecution when he merely leaves it to the discretion of the officer to act entirely upon his own judgment as to whether there will be a criminal prosecution. *Burnham v. Collateral Loan Co.*, 179 Mass. 268 (1901).

In the instant matter, by analogy, it was the Norfolk County Superior Court which (quite properly) decided that it could not assemble the record for an interlocutory appeal while the Respondent's counterclaim was still pending. The Respondents are not even alleged to have participated in the allegedly improper denial of the Petitioner's motions for the immediate assembly of the record for appeal. Certainly, the Respondent cannot be held liable for the decision of the trial court, where there is no evidence that the Respondent acted in concert with the state to deny the Petitioner an avenue of appeal.

If the Petitioner felt aggrieved by the Superior Court's allowance of the Respondent's motion for summary judgment, then the Petitioner could have moved for the entry of a separate and final judgment under Rule 54(b) of the Massachusetts Rules of Civil Procedure or he could have petitioned for interlocutory relief, pursuant to

M.G.L. ch. 231, § 118. He took neither action, rather he mistakenly continued to file requests that the Superior Court assemble the record for appeal.

For all of the above reasons, the Petitioner's claim that his Equal Protection rights were violated must be rejected and this Court should not consider a further review of the United States District Court's dismissal of the Petitioner's complaint.

III. THE PETITIONER HAS FAILED TO PRESENT ANY ALLEGATIONS TO INCULPATE JOHN F. O'BRIEN

The Petitioner has made no allegation at all regarding actions taken by the Respondent, John F. O'Brien, (hereinafter referred to as "O'Brien") individually. Indeed, the only mention of O'Brien is that he is "Chairman of the Board of the Respondent Insurance Company". This action was properly dismissible as to O'Brien because:

(1) it fails to state any cause of action against him whatsoever – i.e., it fails to give O'Brien any reasonable notice as to the claims against him so that he might properly respond; and

(2) it fails to state any cause of action against him individually (as opposed to any conduct as an employee of the Hanover Insurance Company).

> An officer of a corporation does not incur personal liability for a tort committed by a corporation or by one of its officers merely by virtue of the office which he holds in the corporation . . . As to third persons a corporate officer- . . . cannot be held liable unless he commits a

> breach of duty which he owes such person. *Refrigeration Discount Corporation v. Catino*, 330 Mass. 230, 235-236 (1953).

The well-settled rule in Massachusetts is that a corporate officer can be held liable only for torts in which he participated individually. *LeClair v. Silberline Manufacturing Co., Inc.*, 379 Mass. 21, 29 (1979); *Addis v. Steele*, 38 Mass. App. Ct. 433, 439 (1995) ("Without evidence that the individual defendants participated in acts causing injury to the plaintiffs, there was no breach of duty to the plaintiffs"). "It is rare that a court will permit a claimant to look beyond an existing corporation to its officers and shareholders for the satisfaction of an apparent corporate liability". *Massey's Plate Glass Co., Inc. v. Quinlan*, 1992 Mass. App. Div. 104; *Evan v. Multicon Construction Corp.*, 30 Mass. App. Ct. 728, 732 (1991). The Petitioner's complaint was silent as to any alleged role O'Brien had in any alleged violation of the Petitioner's Constitutional rights.

It is also clear that, in appropriate circumstances, a court may find, as a matter of law, that there is no individual liability of a corporate officer. *Buck v. Inn at Coonamessett, Inc.*, 349 Mass. 612, 614-615 (1965) (upholding a directed verdict for lack of evidence that the individual corporate officer "had directly participated in the accident or that he individually had been guilty of any negligent misfeasance"). See also, *Addis v. Steele, supra* (ordering that an involuntary dismissal be entered on behalf of the individual defendants).

The instant matter is, therefore, in stark contrast to cases where an individual corporate officer has been held personally liable. See *Nader v. Citron*, 372 Mass. 96, 102

(1977), where the individual defendant was expressly alleged to have personally commingled and spent the plaintiff's funds. In the absence of any evidence to indicate any claim against O'Brien, the United States District Court rightfully dismissed the complaint.

IV. THE PETITIONER HAS FAILED TO ESTABLISH A LEGITIMATE DUE PROCESS ARGUMENT

The Petitioner also refers to a denial of his right to "due process" under the Fifth and Fourteenth Amendment to the United States Constitution (Pet., p.6). Other than quoting a portion of the amendments, the Petitioner has made absolutely no argument as to how his rights were allegedly violated. Rule 14(1)(a) of the Supreme Court Rules is intended to provide the Respondent with notice of the grounds on which the Petitioner is seeking certiorari, so that the Respondent can direct his opposition to the appropriate issue. *Yee v. Escondido,* 503 U.S. 519, 535-536 (1992). The Petitioner has failed to provide any details on his Fifth and Fourteenth Amendment claims, thereby making it impossible for the Respondent to respond, other than to repeat the argument used above that the restrictions of the Fifth and Fourteenth Amendment do not apply to private citizens. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, and *Driscoll v. Internat'l Union of Operating Engineers,* (7th Cir. 1973) 484 F. 2d 682, *cert. den.* 415 U.S. 960.

Additionally, the Petitioner failed to present to the United States District Court, in opposition to the Respondent's Motion to Dismiss, or in his complaint that his

Fifth or Fourteenth Amendment rights were somehow violated by the actions of the Respondent. (Supp. App., p.27-29) In the absence of exceptional circumstances, this Court does not consider issues not previously raised. *Lawn v. United States,* 355 U.S. 339, at 362, n.16 (1958), citing *Duignan v. United States,* 274 U.S. 195, 200. The Petitioner has presented *no* facts, let alone exceptional facts, to support the allegation of a violation of his Fifth or Fourteenth Amendment rights. This Court, therefore, should reject this argument.

V. THE PETITIONER HAS FAILED TO ESTABLISH A LEGITIMATE ARGUMENT THAT THERE HAS BEEN A VIOLATION OF THE MASSACHUSETTS CIVIL RIGHTS ACT, M.G.L. ch.12, Section 11I.

In his petition, the Petitioner, for the very first time, alleges that the Respondents, through their prior attorney, violated the Massachusetts Civil Rights Act, M.G.L. ch. 12, Section 11I. The Petitioner failed to make any such argument at any of the Courts below, therefore, this Court should exercise its discretion and reject this recent fabrication presented solely to create this false issue.

As noted above, only in exceptional cases will this Court consider issues not raised below. *Lawn v. United States, supra.* There are no exceptional circumstances in this case. As noted throughout this brief, the Petitioner has failed to demonstrate that any constitutional rights were violated. His attempts to appeal the Superior Court's allowance of a motion for summary judgment were premature and he, apparently, did not know that he

had other procedural mechanisms available to him to prosecute his appeal.

This Court must take a serious look at the recent development of this alleged violation of civil rights. The first time that the Massachusetts Civil Rights Act was mentioned in the record was in the Memorandum and Order of the United States District Court, dated May 17, 1996. (App., p.3-7) In that Memorandum, the Judge, who was searching for the slightest hint of an argument, noted that even if the Petitioner were arguing a violation of the Massachusetts Civil Rights Act, said argument would fail because there was no evidence of any "threats intimidation, or coercion" by the Respondents, as required by M.G.L. ch. 12, section 11H. (App., p.5)

In his appeal to the United States Court of Appeals, the Petitioner failed to make any allegation that the Respondents, or their agents, threatened, intimidated or coerced the Petitioner in violation of the Massachusetts Civil Rights Act. It is not until the Petitioner filed this petition to the Supreme Court of the United States that he alleged that the Respondent's attorney made threatening or intimidating comments to him. (Pet., p.7).

Clearly, the Petitioner may not now introduce new arguments of law based upon new and unsupported allegations of fact in an attempt to establish federal jurisdiction in a lawsuit that was frivolous from its inception. *Erie R. Co. v. Solomon*, 237 U.S. 427, 431 (1915).

VI. THE PETITIONER HAS FAILED TO ESTABLISH A LEGITIMATE ARGUMENT THAT ARTICLE XI OF THE MASSACHUSETTS DECLARATION OF RIGHTS WAS VIOLATED

The Petitioner has introduced another argument into the Petition, which never appeared below. Now, he argues that the passage of eighteen months, from his first, misguided attempt to appeal the Massachusetts Superior Court order until he filed his complaint in the United States District Court, constitutes a violation of Part 1, Article XI of the Massachusetts Declaration of Rights.

As this is an entirely new argument raised here for the first time, this Court should not consider this issue unless there are exceptional circumstances. *Lawn, supra.* Clearly, no exceptional circumstances exist. As noted above, the delay in prosecuting his appeal was solely the result of the Petitioner's inexperience and ignorance of the civil procedure rules. The Petitioner could have immediately moved to have a separate and final judgment entered on his dismissed claim, pursuant to Rule 54(b) of the Massachusetts Rules of Civil Procedure, or he could have immediately petitioned for interlocutory relief, pursuant to M.G.L., 231, section 118.

In assessing the delay in obtaining appellate relief, a Court would look to the responsibility or fault attributable to the respective parties. *Doescher v. Estelle,* 454 F. Supp. 943, 947. In the facts at hand, the delay in the Petitioner's appeal was solely the result of his own conduct. The Petitioner had adequate remedies available to him and he did not take advantage of them.

VII. THE PETITIONER FAILED TO STATE A LEGITIMATE CAUSE OF ACTION AGAINST THE RESPONDENTS, THEREFORE, THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT

Issue IV in the Petition appears to claim that because the Petitioner, in drafting his complaint, relied upon a guide book, apparently published by the United States District Court, then his complaint should not have been dismissed. This issue does not raise any new arguments, rather it simply concludes that the District Court improperly dismissed this action because of an alleged "misstep" by the Petitioner in the drafting of the complaint.

As noted above, the United States District Court properly dismissed the Petitioner's complaint because: (1) the Petitioner failed to allege any conduct committed by the Respondents, as opposed to the Superior Court or Attorney Mark Mahnken, which caused the Petitioner any harm "constitutional or otherwise" (App., p.4); (2) the Fourteenth Amendment applies only to state actions as does the federal civil rights statute, 42 U.S.C. § 1983, therefore, no liability would attach to private parties, such as the Respondents, *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991); (3) the complaint failed to allege any factual support to the theory that the Superior Court judge and the Respondents acted together under the color of state action; (App., p.5); (4) if the Petitioner intended to allege a violation of M.G.L. ch. 12, section 11I, the Massachusetts Civil Rights Act, it too, must fail in the absence of any threats, intimidation or coercion (App., p.5); and (5) the Superior Court acted properly in refusing to assemble the record for the Petitioner's appeal in

light of the fact that the Petitioner had not complied with the applicable laws and rules of civil procedure (App., p.6).

Even giving the Petitioner all the benefits of doubt in reviewing his complaint, the United States District Court properly dismissed the complaint on its merits, not because the Petitioner may have drafted the complaint without the expertise of a practiced attorney.

VIII. THE PETITIONER'S ALLEGATIONS OF BAD FAITH AGAINST COUNSEL FOR THE RESPONDENTS ARE INCORRECT, IRRELEVANT AND DO NOT FORM THE BASIS OF A FEDERAL QUESTION

Issue V of the Petitioner alleges, for the first time, that Attorney Mark Mahnken, as counsel for the Respondents: threatened and intimidated the Petitioner (Pet., p.10); lied to the employers of the Petitioner (Pet., p.10); and obtained privileged tax records of the Petitioner (Pet., p.10). The Respondent denies all of the above allegations and the Petitioner has failed to provide any evidence of his allegations. Without any factual support to the allegations, this Court should not consider the unfounded accusations.

As evidenced above, the Petitioner's denial of access to appeal this matter was the result of his own doing and there is no support that the Respondents took any steps to interfere unlawfully with the Petitioner's exercise of his appellate rights.

Furthermore, the arguments that the Respondents, through their attorney, intimidated the Petitioner, lied to

the Petitioner's employers and obtained privileged tax records of the Petitioner were never issues presented to the United States District Court. In the absence of exceptional circumstances, this Court should not entertain new allegations raised for the first time in a petition for a writ of certiorari. *Lawn, supra.*

IX. THE PETITIONER'S ALLEGATION OF A CONSPIRACY BETWEEN THE SUPERIOR COURT AND THE RESPONDENT'S ATTORNEY IS FRIVOLOUS AND WITHOUT ANY BASIS

The record is clear that there was no conspiracy between Attorney Mark Mahnken and Judge Connolly, of the Norfolk County Superior Court. The Petitioner's repeated efforts to initiate his appeal of the issuance of a summary judgment order were not blocked by the Respondents or their attorney, rather, the requests were rightfully denied by the Superior Court as no final judgment had entered, therefore, no appeal could then be pursued in the manner in which the Petitioner sought, as per Rule 54 of the Massachusetts Rules of Civil Procedure and M.G.L. ch. 231, § 113.

X. THE PETITIONER'S ALLEGATION THAT THE PUBLIC INTEREST IS INVOLVED IS OVERLY VAGUE AND DOES NOT COMPLY WITH RULE 14 OF THE RULES OF SUPREME COURT

The Petitioner's tenth and final issue does not raise any question at all. This claim merely asserts that the "public interest is involved" (Pet., p.11) The Petitioner has failed to provide the Respondent with any details on

the issue that he seeks to be reviewed. Rule 14(1)(a) of the Supreme Court Rules is intended to provide the Respondent with notice of the grounds on which the Petitioner is seeking certiorari, so that the Respondent can direct his opposition to the appropriate issue. *Yee v. Escondido*, 503 U.S. 519, 535-536 (1992).

The Petitioner clearly has not complied with the requirements of Rule 14, which is to express concisely the question presented for review and how the circumstances of this case would apply. The Petitioner merely claims that this Court must act so that a judge/attorney cannot prevent a case from being appealed.

CONCLUSION

The Petition for Writ of certiorari should be denied.

Respectfully submitted,

Dated: January 31, 1997

GEORGE R. SUSLAK, Esquire
Counsel of Record for Respondents
STANTON & LANG
200 Broadway, P.O. Box 1080
Lynnfield, MA 01940
(617) 595-1440

NOTICE OF LIEN

Notice is hereby given, pursuant to Massachusetts General Laws, Chapter 221 §50 and pursuant to any and all other applicable law, that Attorney Stuart D. Ravech hereby claims a lien on any recoveries, whether by judgment, settlement or otherwise which maybe had and arising from all personal injuries suffered by Mr. Fred Davis on or about February 11, 1987 in Revere, Massachusetts.

Terms of said lien shall be in the amount of $7,500.00 of any recovery, settlement or judgment.

/s/ Stuart Ravech
Stuart Ravech, Esq.
RAVECH, ARONSON &
SHUMAN, P.C.
125 Summer Street
Boston, MA 02110
(617) 439-0200

DATED: April 26, 1991

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

SUPERIOR COURT
No. 93 00574

FRED DAVIS, Plaintiff	*	COMPLAINT
V.	*	JURY TRIAL REQUESTED ON ALL COUNTS
HANOVER INSURANCE COMPANY, et al Defendants	*	

1. Plaintiff, Fred Davis, of Malden, County of Middlesex, Commonwealth of Massachusetts.

2. Defendant, Hanover Insurance Company, of Braintree, County of Norfolk, Commonwealth of Massachusetts.

3. Defendant's usual place of business is located at 33 Braintree Hill Park, Braintree, Massachusetts.

COUNT I

September 20, 1991, plaintiff signed a contract with Hanover Insurance Company under the following terms and conditions; (1) amount of consideration $20,000.00, (2) draft payable to Fred Davis and his attorney Robert T. Abrams. (3) Draft is to be paid within 30 days. (4) this contract was executed as a sealed instrument.

Hanover Insurance Company knowingly and wilfully breached this contract. Hanover failed to fulfill its obligation.

As a result of this breach of the contract the plaintiff sustained monetary losses, pain and suffering and harassment.

COUNT II

CAUSE OF ACTION

The plaintiff and the defendant entered into a contract, however, the defendant knowingly and wilfully breached the terms and conditions of the contract.

Hanover Insurance Company did not fulfill its obligation to the plaintiff, causing him monetary losses, pain and suffering and harassment.

COUNT III

M.G.L. c. 93A

At all times relevant to this action defendant was engaged in trade or commerce in the Commonwealth of Massachusetts within the meaning of M.G.L. c. 93A.

The acts and practices of Hanover Insurance Company as described herein were unfair and deceptive within the meaning of M.G.L. c. 93A.

The acts and practices of the defendant were willful and knowing violations of M.G.L. c. 93A.

The acts and practices of Hanover Insurance Co. were unfair and deceptive within the meaning of M.G.L. c. 93A and as a result plaintiff suffered substantial losses of money.

COUNT IV

The plaintiff is a senior citizen.

Hanover Insurance Company wants to cheat the plaintiff out of monies that are due to him.

The defendants acts are also being used to harass, hurt and harm the plaintiff.

V. RELIEF FROM THE COURT

Plaintiff requests the following relief from the court:

1. Amount of contract $20,000.00.
2. Interest from September 20, 1991
3. Pain and Suffering $10,000.00.
4. Pursuant to M.G.L. c. 93A double or triple damages along with interest from September 20, 1991.
5. Costs, legal fees and other relief the court may deem appropriate.

Jury trial requested on all counts.

By,

/s/ Fred Davis

Fred Davis
353 Bryant Street
Malden, Ma. 02148
(617) 322 8578

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO: 93-00574

FRED DAVIS,)
Plaintiff)
)
vs.)
)
HANOVER INSURANCE)
COMPANY,)
Defendant)

ANSWER AND AFFIRMATIVE DEFENSES

Now comes the defendant, Hanover Insurance Company, in the above entitled matter and answers each and every allegation contained in the plaintiff's Complaint as follows:

1. The defendant admits the allegations contained in paragraph number one of the plaintiff's Complaint.
2. The defendant admits to maintaining a claims office in Braintree, Massachusetts.
3. The defendant admits to maintaining a claims office in Braintree, Massachusetts.

COUNT I

Defendant admits that plaintiff settled a personal injury claim against its insured and states that at the time of the settlement, claimant was represented by Attorney Robert T. Abrams. At the time of the settlement, prior counsel Stuart Ravech, Esq., maintained a lien in the amount of $7,500.00. Defendant denies breaching any

agreement with the plaintiff and states that it has made diligent efforts to pay the settlement to the plaintiff, to no avail. Defendant denies causing monetary loss to the plaintiff and denies harassment as alleged.

COUNT II

Defendant denies the allegations of Count II.

COUNT III

Defendant admits that it is engaged in trade or commerce in the Commonwealth of Massachusetts within the meaning of M.G.L. Ch.93A.

Defendant denies engaging in unfair and deceptive business practices under M.G.L. Ch.93A.

Defendant denies any willful or knowing violation of M.G.L. Ch.93A.

Defendant denies the remaining allegations of Count III.

COUNT IV

Defendant can neither admit nor deny that plaintiff is a "senior citizen" without a specific reference to a description of the words "senior citizen".

Defendant denies any effort to cheat plaintiff of money that is due to him.

Defendant denies engaging in any acts intended to harass, hurt, or harm the plaintiff.

Defendant acknowledges herein, as it has on many prior occasions, that plaintiff is entitled to

a settlement of his personal injury claim in the amount of $20,000.00, subject to a lien asserted by Attorney Stuart Ravech.

Defendant denies owing interest to the plaintiff from September 20, 1991.

Defendant denies owing any money to plaintiff for his alleged pain and suffering.

Defendant denies owing money to plaintiff pursuant to M.G.L. Ch.93A.

Defendant denies owing money for costs, legal fees or otherwise to the plaintiff as alleged.

Wherefore, defendant demands that the Complaint be dismissed and that it be awarded costs and attorney's fees.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE:

And further answering, defendant has tendered and continues to tender $20,000.00 to the plaintiff, subject to an attorney's lien claimed by Stuart Ravech, Esq.

SECOND AFFIRMATIVE DEFENSE:

And further answering, defendant has sent plaintiff a check for $20,000.00 near in time to the execution of a Release, therefore, plaintiff is not entitled to interest as alleged.

THIRD AFFIRMATIVE DEFENSE:

And further answering, the Complaint fails to state a cause of action upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE:

And further answering, plaintiff has failed to satisfy each and every prerequisite to the bringing of a claim under M.G.L. Ch.93A, therefore, plaintiff cannot recover.

FIFTH AFFIRMATIVE DEFENSE:

And further answering, defendant states that plaintiff has given improper and insufficient notice under M.G.L. Ch.93A, therefore, plaintiff cannot recover.

SIXTH AFFIRMATIVE DEFENSE:

And further answering, the defendant denies being liable or indebted to the plaintiff in any way or manner.

SEVENTH AFFIRMATIVE DEFENSE:

Wherefore, the defendant demands that the plaintiff's Complaint be dismissed and that defendant be awarded costs and expenses.

DEFENDANT HANOVER INSURANCE COMPANY'S COUNTERCLAIM FOR DECLARATORY JUDGMENT

1. Plaintiff Fred Davis has filed a Complaint against Hanover Insurance Company alleging to be owed $20,000.00 from a personal injury settlement and alleging violations of M.G.L. Ch.93A, harassment and acts designed to "cheat the plaintiff" from monies that are due to him.

2. Plaintiff Fred Davis has made numerous communications with the Commonwealth of Massachusetts Executive Office of Consumer Affairs, Division of Insurance, alleging improper acts and practices of Hanover Insurance Company.

3. Plaintiff Fred Davis has communicated with Governor William Weld alleging being a victim of a "fraud scheme" and alleging that he was "swindled" from money by Hanover Insurance Company and its employees.

4. Plaintiff Fred Davis has made numerous communications to the president of Hanover Insurance Company alleging a "conspiracy" to defraud him of monies which he claims are due to him.

5. Hanover Insurance Company seeks a declaration that it owes no monies to Fred Davis other than $20,000.00 which it has tendered to him, and continues to tender to him, subject to a lien asserted by Stuart Ravech, Esq.

6. Hanover Insurance Company also seeks the following remedies:

   a. That Fred Davis be restrained from filing additional Complaints on the issue of his personal injury claim for the alleged mishandling of his claim, fraud, harassment, and the like, without prior leave of Court;

   b. That Fred Davis be enjoined from further communications about this matter, or related matters, directed to Hanover Insurance Company, its agents, servants or employees;

   c. That Fred Davis be permanently enjoined from further communications to Hanover Insurance Company, its agents, servants, employees or attorneys intended to harass and annoy said individuals without prior leave of Court;

   d. Such other remedies as the Court deems just.

   e. Costs and attorney's fees in this action.

OFFER OF JUDGMENT

Hanover Insurance Company, by its attorney, hereby tenders an Offer of Judgment to Fred Davis in the amount of $20,000.00, subject to an attorney's lien filed by Stuart Ravech, Esq.

THE DEFENDANT CLAIMS A TRIAL BY JURY.

Hanover Insurance Company,
by its attorney,

/s/ Mark F. Mahnken
Mark F. Mahnken
DRISCOLL, GILLESPIE & STANTON
200 Broadway
P.O. Box 850
Lynnfield, Mass. 01940
(617) 596-2200
BBO: #314-400

Dated: 3/24/93

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO: 93-00574

FRED DAVIS,)
Plaintiff)
)
vs.)
)
HANOVER INSURANCE)
COMPANY,)
Defendant)

DEFENDANT HANOVER INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT UNDER M.R.C.P. 56

Now comes the defendant Hanover Insurance Company in the above-entitled action and moves this Honorable Court to grant its motion for Summary Judgment. In support thereof, Hanover has filed this memorandum of law, stating that there are no genuine issues of material fact and that Hanover is required to honor an attorney's lien in issuing its settlement draft under the applicable standard of Massachusetts law.

STATEMENT OF FACTS

The plaintiff, Fred Davis has filed suit herein and alleges that Hanover Insurance Company has breached a contract with him, and also violated M.G.L. Ch.93A by refusing to issue a settlement draft in the amount of $20,000.00 to his attorney, Robert T. Abrams and himself, without naming a lienholder on the draft. The plaintiff

also alleges that Hanover has no right to include the name of his first attorney, Stuart Ravech, who initially represented the plaintiff and who, on plaintiff's behalf, filed a personal injury suit in a case entitled *Fred Davis V. Anthony Lauria, Boston Municipal Court, Docket #:T-41026.* The plaintiff states that Hanover Insurance company ("Hanover") breached the terms of an agreement to settle the personal injury tort case in order to "cheat" and "harass" him and to take advantage of a "senior citizen".

It is the position of Hanover that under the requirements of Massachusetts law, it must honor an attorney's lien of which it has been given notice, or risk being sued by the attorney. Further, it is Hanover's position that at all times it was willing and able to honor the terms of the personal injury settlement and in no way attempted to cheat or harass the plaintiff.

On or about February 2, 1987 the plaintiff alleges that he was injured as a result of a motor vehicle accident which occurred in Revere when he was struck by a vehicle driven by Mr. Lauria (Hanover's insured). The plaintiff was first represented by Attorney Stuart Ravech, who filed a personal injury suit in the Suffolk County on January 22, 1990. With leave of Court, Attorney Ravech withdrew as counsel on April 26, 1991. Concurrently, Attorney Raveck filed an attorney's lien with Hanover and with plaintiff's subsequent counsel, Attorney Robert T. Abrams (see notice of lien, attached hereto as Exhibit A).

In September of 1991, counsel for the parties entered into a settlement agreement in the amount of $20,000. By agreement with Attorney Abrams, Hanover issued the

settlement draft payable to the plaintiff, and attorneys Ravech and Abrams (see correspondence from Attorney Abrams dated September 26, 1991, attached as Exhibit B and settlement draft attached as Exhibit C). The plaintiff did not want Hanover to honor the attorney's lien, however, Attorney Abrams represented to Hanover's attorney that the plaintiff would resolve the fee dispute with Attorney Ravech through the Massachusetts Bar Association (Exhibit B).

Accordingly, Hanover issued the settlement draft payable to "Fred Davis, Attorney Robert T. Abrams, and Attorney Stuart D. Ravech," however, the plaintiff refused to endorse the check, and has demanded that Attorney Ravech's name be removed. In order to resolve this dispute, Hanover has offered to execute two drafts, one payable in the amount of $12,500.00 payable to the plaintiff and Attorney Abrams, and one payable to plaintiff Attorney Abrams and Attorney Ravech in the amount of $7,500.00 (the amount of the lien). (See correspondence from Hanover dated February 14, 1992, attached here as Exhibit D). The plaintiff has declined this offer, and has insisted that the check be made payable only to Attorney Abrams and himself, without naming the lienholder. In addition, he filed a complaint against Hanover with the Division of Insurance, and the instant lawsuit alleging breach of contract and violations of M.G.L. Chapter 93A.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A case alleging unfair or deceptive acts or practices is an appropriate matter from summary judgment only if

there is no genuine issue of material fact. *Noyes v. Quincy Mutual Fire Insurance Co.*, 7 Mass. App. 723 (1979). Summary judgment should be entered when there is no genuine issue of material fact and when there is substantive law under which judgment may be entered for the moving party. *Theran v. Rokoff*, 413 Mass. 590, 602 N.E.2d 191 (1992). To avoid summary judgment, an opposing party may not rest on his pleadings or general denials, he must set forth specific facts showing that there is a genuine triable issue. *Turner v. McAne*, 4 Mass. App. 864, 357 N.E.2d 942 (1976).

II. SUMMARY JUDGMENT SHOULD BE ENTERED ON COUNTS I AND II OF THE PLAINTIFF'S COMPLAINT AS THERE IS NO EVIDENCE THAT HANOVER BREACHED ITS CONTRACT WITH PLAINTIFF, AS HANOVER IS REQUIRED UNDER MASSACHUSETTS LAW TO HONOR THE ATTORNEY'S LIEN FROM PLAINTIFF'S FIRST ATTORNEY

In the instant case, the plaintiff alleges in Counts I and II of his Complaint, filed Pro Se, that Hanover entered into a contract to settle his personal injury suit for $20,000.00, payable to Fred Davis and his attorney, Robert T. Abrams, to be paid within thirty days. The plaintiff further alleges that Hanover thereafter knowingly and willfully breached this contract, causing the plaintiff to sustain monetary losses, pain and suffering and harassment. In Count II, the plaintiff reavers that the defendant breached the terms of its contract.

It is agreed upon that plaintiff and Hanover entered a settlement agreement by which the plaintiff would receive $20,000.00 in settlement of his personal injury law

suit. On September 20, 1991, a Release was signed by the plaintiff (Exhibit I). However, well prior to issuing the check, Hanover was notified that there was an attorney's lien on the file by Attorney Stuart Ravech, the plaintiff's first attorney. The plaintiff's second attorney, Robert T. Abrams, notified Hanover to make the check payable to the plaintiff and Attorney's Ravech and Abrams and that the plaintiff would resolve the fee dispute with Attorney Ravech through the Massachusetts Bar Association (Exhibit B). After Hanover issued the settlement draft, the plaintiff refused to endorse the check. Hanover offered to issue two drafts, one payable to plaintiff and attorney Abrams in the amount of $12,500.00 and one payable to plaintiff and Attorney Abrams and Attorney Ravech in the amount of $7,500.00, but plaintiff refused this offer and filed suit.

Breach of contract connotes the violations of a contractual duty which one person owes to another. 14 Simpson, *Mass. Practice Series s.271.* Non-performance of a contract is the failure to perform the whole or a material part of a contract, whether or not the party so failing to perform was, under the circumstances existing at the time, legally bound to render performance. *Realty Developing Co., Inc. v. Wakefield Ready-Mixed Concrete Co.* 327 Mass. 535, 100 N.E.2d 28.

There may be an agreement of the parties, subsequent to the making of the contract substituting new terms, or a new contract or a new or different performance, or the contract may have been waived by agreement of the parties. In such case, non-performance of the terms of the original contract would not constitute a breach of it. *Cueovon v. Coburnville Garage, Inc.* 315 Mass.

135, 52 N.E.2d 16. Pertinent to the instant action, however, at no time did Hanover Insurance represent to plaintiff that it would not honor the attorney's lien. Applying the above law to the present case, it is argued by Hanover that it did not breach the settlement agreement entered into between the parties in September, 1991. When Hanover became aware of the attorney's lien placed on the plaintiff's case, it was obligated under Massachusetts law to honor the attorney's lien from plaintiff's first attorney or risk being sued if it ignored the lien in issuing the settlement draft to plaintiff without the name of the lienor. The addition to Attorney Ravech's name on the settlement draft was not a breach of the settlement agreement because Attorney Abrams had prior notice that Hanover would honor the attorney's lien (See Exhibit G and Exhibit H). It is well-settled under Massachusetts statutory and case law that an attorney's lien comes into being once suit is commenced by an attorney on behalf of her client. M.G.L. c. 221, s.50. See, *In re Hoy's Claim*, D.C. Mass., 93 F. Supp. 265. The right given to an attorney under G. L. 221, s. 50, purporting to confer an attorney's lien upon a cause of action from the authorized commencement of action, is a substantive right and not a procedural right. Id. Moreover, the statutory lien for attorney's fees is a charging lien which binds judgment or money decree for payment of expenses incurred and for services rendered by attorney with respect to particular action or suit. *Torphy v. Reder*, 257 N.E.2d 435, 357 Mass. 153, appeal after remand 277 N.E.2d 528, 360 Mass. 869 (1970).

It has been held by the United States District Court that if a tort claimant's attorney filed suit before, even

one minute before, the claimant (without the attorney's knowledge) released his claim against the defendant, the attorney has a lien on his client's cause of action. *Thurston v. Hutchinson,* D.C. Mass., 93 F. Supp. 265 (applying M.G.L.A. c. 221 S. 50). While a release may have discharged the defendant's liability to the plaintiff, it leaves the defendant liable to the attorney to the extent of his lien, if the attorney filed suit on behalf of his client before the release was executed, and the defendant knew that fact. "This lien made it impossible finally to dispose of this suit without his (the attorney's) consent; the defendant was charged with notice of the lien, and he (the attorney) could have forced the defendant to pay a second time had it (the defendant) disregarded his (the attorney's) rights. *Woodbury v. Andrew Jergens Co.,* 69 F.2d 49, 50. Hanover requests that the Court grant Summary Judgment in its favor on Counts I and II of the plaintiff's Complaint.

III. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF HANOVER ON COUNT III BECAUSE PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR 93A VIOLATION – THAT HANOVER ENGAGED IN UNFAIR OR DECEPTIVE ACTS

Under M.G.L. 93A, once the plaintiff has established that he is a "consumer" and that the transaction giving rise to his Complaint is one covered by c.93A, he needs to show that the defendant's acts were "unfair" or "deceptive". There is no general rule as to what constitutes an unfair or deceptive act or practice. *35 Mass. Pract. S. 130 (Alperin & Chase).* A special procedural requirement to a summary judgment action is that the consumer must mail

or deliver to the prospective defendant, a "written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon the injury suffered." M.G.L.A. c.93A(3).

An important hurdle for the consumer to overcome in prevailing in a 93A action is for the consumer to show that he has suffered a "loss of money or property, real or personal", as a result of the defendant's use of an unfair or deceptive act or practice. M.G.L.A. c.93A s.9(1).

In the present case, the plaintiff has failed to allege and plead the presentation of a demand pursuant to M.G.L. Ch.93A, paragraph 3 (Exhibit J). The thirty day demand letter has been held to be a jurisdictional prerequisite to filing a consumer claim under M.G.L. Ch.93A. *Spring v. Geriatric Authority* 394 Mass. 274, 287, 475 N.E. 2d 727, 735 (1985). A demand letter describing the specific unfair practices claimed and listing the damages suffered is a prerequisite to suit and must be alleged and proved. *Baldassari v. Public Finance Trust* 337 N.E. 2d 701, 369 Mass. 33. Even if plaintiff had made a proper presentation of his 93A claim, Hanover argues that it was nonetheless required to honor Attorney Ravech's lien or risk being sued for the claimed amount in issuing the full settlement check to plaintiff and his second attorney. Even the plaintiff's second attorney was in agreement with Hanover's agreement to issue the check payable to plaintiff and Attorney Ravech and Abrams (Exhibit B).

In light of the above, Hanover requests the Court to enter Summary Judgment in its favor on Count III of the plaintiff's Complaint.

IV. SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF HANOVER ON COUNT IV OF THE PLAINTIFF'S COMPLAINT AS PLAINTIFF FAILS TO SET FORTH FACTS SHOWING HANOVER HAS ATTEMPTED TO CHEAT THE PLAINTIFF OUT OF MONIES OWED

In Count IV, it appears that the plaintiff is alleging that Hanover is attempting to cheat him out of monies owed, due to the fact that he is a senior citizen (Complaint, Exhibit J).

The plaintiff, however, has failed to allege facts sufficient to raise a question as to fraudulent intent on the part of Hanover, but only states that Hanover refused to issue a settlement check payable only to him and his second attorney. These allegations impermissibly ignore Hanover's statutory responsibility to honor the attorney's lien.

In a recent case entitled *Equitable Life Assurance Society of the U.S. v. Porter-Englahart*, C.A.1 (Mass) 1989, 867 F.2d 79, the United States District Court examined a 93A claim filed by a widow alleging unfair and deceptive insurance claim settlements. The Court found that the widow was not entitled to multiple damages from insurer based on its payments of the widow's share of accidental death benefits into court in an interpleader action involving dispute as to another portion of death benefits. Id. The Court denied Widow's claim for damages reasoning that there was no indication of bad faith on the insurer's part where the insurer gained nothing for itself by holding the funds back.

In applying the above law to the present facts, it is Hanover's position that at no time did it intend to or did it cheat the plaintiff out of settlement monies. In fact, Hanover issued the check in the manner agreed to by plaintiff's attorney, Mr. Abrams, who at least tacitly acknowledged that Hanover had a legal obligation to honor Attorney Ravech's lien. (Also see Affidavit of Larry Roberson, Claim Manager of Hanover, attached hereto as Exhibit E). Furthermore, the plaintiff has failed to state any facts supporting his claim that Hanover's actions were intended to harass, hurt or harm the plaintiff. At all times it has been Hanover's intention to resolve the matter lawfully, amicably and efficiently.

In light of the foregoing, Hanover requests the Court to enter Summary Judgment on Count IV of the plaintiff's Complaint.

V. CONCLUSION

Applying the above law to the instant case, it is argued on behalf of Hanover that since it had notice of Attorney Ravech's lien since April 1991, that it could not ignore the lien in issuing the settlement draft without risking paying a second time. Furthermore, based on a reading of the statutory language of G.L. 221, S. 50 (attached hereto as Exhibit F), it is undisputed that once an attorney has instituted an action on behalf of a client, that the attorney has a lien for his reasonable fees and expenses. Even if Attorney Ravech had not filed an attorney's lien with the court prior to the time of settlement, as a matter of law his lien was in existence and must be honored by Hanover.

In light of the above, Hanover respectfully requests this Honorable Court to grant its Motion for Summary Judgment. The plaintiff has failed to set forth any facts establishing breach of contract, fraud or violations of M.G.L. 93A. The only matter properly before this court is whether or not the attorney's lien filed by Attorney Ravech must be honored. At all times, Hanover has conducted itself in accordance with the statutory requirements and in good faith in dealing with the plaintiff and his attorneys.

Furthermore, the statutory case law of Massachusetts supports that as a matter of law, that Attorney Ravech's lien must be honored by Hanover in issuing its settlement draft or risk being sued by Attorney Ravech.

Hanover Insurance Company,
by its attorney,

/s/ Mark F. Mahnken
Mark F. Mahnken
DRISCOLL, GILLESPIE
& STANTON
200 Broadway
P.O. Box 850
Lynnfield, Mass. 01940
(617) 596-2200
BBO: #314-400

Dated: 8/25/93

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
NO: 93-00574

FRED DAVIS,
Plaintiff
vs.
HANOVER INSURANCE COMPANY,
Defendant

MOTION OF DEFENDANT,
HANOVER INSURANCE COMPANY
FOR SUMMARY JUDGMENT UNDER M.R.C.P. 56

Now comes the defendant, Hanover Insurance Company and moves this Honorable Court pursuant to Mass. R. Civ. P. Rule 56(b) to enter summary judgment in favor of the Counts I-IV of plaintiff's Complaint as a matter of law.

An Affidavit, Memorandum of Law and exhibits are attached hereto.

Defendant
By its attorney,

/s/ Mark F. Mahnken
Mark F. Mahnken
DRISCOLL, GILLESPIE
& STANTON
200 Broadway
P.O. Box 850
Lynnfield, Mass. 01940
(617) 596-2200
BBO: #314-400

1/14/94 – After hearing and upon considering all submissions, and the entire file, Motion of Defendant, Hanover Insurance Company for Summary Judgment is Allowed in its totality. See: Defendant's Memorandum attached hereto.

JSC

/s/ Thomas S. Connolly

DOCKET ENTRIES

Fred Davis vs. Hanover Insurance Company

1993 March 10	Complaint and Jury Claim
1993 March 10	Cover Sheet
1993 March 10	Fast Track Notice sent to Plaintiff
1993 March 16	Return of Service Re: Hanover Insurance Co. – In Hand to Deanna Chace, Clerk
1993 April 1	Deft's Answer, Counterclaim and Jury Claim
1993 April 5	Plff's Answer to Deft's Counterclaim
1993 April 21	Plff's Motion to Strike Deft's Answer to Plff's Complaint – date Received April 15, 1993
1993 April 21	Deft's Opposition to Plff's Motion to Strike Deft's Answer – date Received April 15, 1993
1993 April 21	Deft's Memorandum in Support of Opposition to Plff's Motion to Strike Deft's Answer
1993 April 26	Re: Plff's Motion to Strike Deft's Answer to Plff's Complaint (p.#6a) Denied (Brady, J.) dated April 22, 1993 c.s. April 26, 1993
1993 August 30	Plff's Motion Compelling Production of All Documents
1993 August 30	Deft's Opposition to Plff. Fred Davis' Motion to Compel Production of Documents
1993 August 30	Plff's Affidavit of Compliance with Superior Court Rule 9A
1993 Sept. 8	Re: Plff's Motion Compelling Production of All Documents (p.#7a) Denied without Prejudice – No Rule 9C Certificate (Hely, J.) dated Sept. 1, 1993 c.s.

1993 Sept. 24	Deft's Motion for Summary Judgment Under M.R.C.P. 56
1993 Sept. 24	Deft's Memorandum of Law in Support of Its Motion for Summary Judgment Under M.R.C.P. 56
1993 Sept. 24	Plff's Opposition to Deft's Motion for Summary Judgment and Memorandum in Support of Plff's Opposition to Deft's Motion for Summary Judgment
1993 Sept. 24	Plff's Memorandum in Support of Opposition to Deft's Motion for Summary Judgment
1993 Sept. 24	Deft's Document List
1993 Oct. 5	Deft's Motion for Order to Produce Pursuant to M.R.C.P. 37
1993 Oct. 5	Plff's Opposition to Deft's Motion for Order to Produce Pursuant to M.R.C.P. 37
1993 Oct. 12	Re: Deft's Motion for Order to Produce Pursuant to M.R.C.P. 37 (p.9a) Motion Allowed. Thirty Days to Produce (Stearns, J.) n.a.
1993 Oct. 12	Plff's Motion for Enlargement of Time for Production of Documents
1993 Oct. 12	Re: Plff's Motion for Enlargement of Time for Production of Documents (p.#10) Motion Denied (Stearns, J.) n.s.
1993 Nov. 2	Plff's Motion for Sanctions Against Attorney Mark F. Mahnken
1993 Nov. 2	Opposition to Plff's Motion for Sanctions Against Attorney Mark F. Mahnken
1993 Nov. 2	Plff's Opposition to Opposition of Deft. to Plff's Motion for Sanctions Against Attorney Mark F. Mahnken
1993 Nov. 2	Plff's Affidavit of Compliance with Superior Court Rule 9A

1993 Nov. 2	Plff's Affidavit of Compliance with Superior Court Rule 9A – Re: Rule 9C
1993 Nov. 2	Plff's Opposition to Deft's Opposition to Plff's Request for Leave of Court from Compliance with Rule 9C
1993 Nov. 2	Plff's Request Leave of Court from Complying with Rule 9C and Memorandum in Support of Request Leave of Court from Complying with Rule 9C
1993 Nov. 2	Deft's Opposition to Plff's Request for Leave of Court from Compliance with Rule 9C
1993 Nov. 5	Re: Plff's Motion for Sanctions Against Attorney Mark F. Mahnken (p.#11a) Motion Denied (Stearns, J.) dated Nov. 3, 1993 c.s.
1993 Nov. 12	Plff's Motion for Protective Order Barring the Taking of Attorney Robert T. Abrams' Deposition and Memorandum in Support of Protective Order Barring the Taking of Attorney Robert T. Abrams' Deposition
1993 Nov. 12	Plff's Affidavit of Compliance with Superior Court Rule 9A
1993 Nov. 12	Plff's Opposition to Opposition of Hanover Ins. Co. to Plff's Motion for Protective Order Regarding Deposition of Robert T. Abrams
1993 Nov. 12	Deft's Opposition to Plff's Motion for Protective Order Regarding Deposition of Robert T. Abrams
1993 Nov. 26	Plff's Motion for Change of Venue – date Received Nov. 22, 1993
1993 Nov. 26	Deft's Opposition to Plff's Motion for Change in Venue – date Received Nov. 22, 1993

1993 Nov. 26	Plff's Opposition to Deft's Opposition to Plff's Motion for Change in Venue – date Received Nov. 22, 1993
1993 Nov. 26	Plff's Affidavit of Compliance with Superior Court Rule 9A – date Received Nov. 22, 1993
1993 Dec. 9	Re: Plff's Motion for Protective Order Barring the Taking of Attorney Robert T. Abrams' Deposition (p.#12a) Motion Denied (Stearns, J.) dated Nov. 16, 1993 c.s.
1993 Dec. 15	Deft's Motion to Quash Deposition Notice of John F. O'Brien and to Quash Subpoena Duces Tecum
1993 Dec. 15	Plff's Opposition to Deft's Motion to Quash Deposition Notice of John F. O'Brien and to Quash Subpoena Duces Tecum
1993 Dec. 15	Deft's Certificate Pursuant to Superior Court Rule 9C
1993 Dec. 15	Deft's Certificate of Service
1993 Dec. 22	Re: Plff's Motion for Change in Venue (p.#13a) Motion Denied (Stearns, J.) dated Dec. 17, 1993 c.s.
1993 Dec. 29	Rule 9A Scheduling Order Re: Deft's Motion for Summary Judgment with Opposition Scheduled for Friday, January 14, 1994 at 9:30 a.m. before Judge DelVecchio in Court Room 3 c.s.
1993 Dec. 30	Re: Deft's Motion to Quash Deposition Notice of John F. O'Brien and to Quash Subpoena Duces Tecum (p.#14a) Motion ALLOWED (Chernoff, J.) dated Dec. 29, 1993 c.s.

1994 Jan. 18	Re: Deft's Motion for Summary Judgment Under M.R.C.P. 56 (p.#8a) – After hearing, and upon considering all submissions, and the entire file, Motion of Deft. Hanover Insurance Company for Summary Judgment is ALLOWED in its totality. See: Defendant's Memorandum-attached exhibits. (Connolly, J.) dated Jan. 14, 1994 n.s.
1994 Jan. 21	Plff's Notice of Appeal
1994 Jan. 27	Plff's Motion for Costs Against the Defendant
1994 Jan. 27	Deft's Opposition to Plff's Motion for Costs
1994 Jan. 27	Plff's Affidavit of Compliance with Superior Court Rule 9A
1994 Feb. 4	Re: Plff's Motion for Costs Against the Defendant (p.#17a) Motion DENIED (Connolly, J.) dated Feb. 3, 1994 c.s.
1994 Aug. 12	Plff's Third Motion for Immediate Assembly of the Record and Memorandum in Support of Third Motion for Immediate Assembly of the Record – date Received Aug. 10, 1994
1994 Sept. 16	Re: Plff's Third Motion for Immediate Assembly of the Record (p.#18) – Motion DENIED (White, J.) dated Sept. 14, 1994 c.s.
1995 July 19	Plff's Fifth (fourth) Notice of Immediate Assembly of the Record
1995 Aug. 14	Plff's Sixth Notice of Assembly of Record and Courts Letter to Mr. Davis

1995 Aug. 24	Notice sent to all Parties for a Status Conference on Monday, September 11, 1995 at 2:30 p.m. before Judge Dortch-Okara c.s. – Failure to appear with result in Automatic Default or Dismissal (Dortch-Okara, J.)
1995 Sept. 12	Deft's Motion for Voluntary Dismiss Re: Motion Allowed (Dortch-Okara, J.) dated Sept. 11, 1995 n.s.
1995 Sept. 12	Judgment (Summary) Re: Count I of Case in Chief (Connolly, J.) c.s.
1995 Sept. 12	Judgment (Summary) Re: Count II of Case in Chief (Connolly, J.) c.s.
1995 Sept. 12	Judgment (Summary) Re: Count III of Case in Chief (Connolly, J.) c.s.
1995 Sept. 12	Judgment (Summary) Re: Count IV of Case in Chief (Connolly, J.) c.s.
1995 Sept. 12	Judgment Re: Counterclaim on Deft's Motion for Voluntary Dismissal of Its Counterclaim (Dortch-Okara, J.) c.s.
1995 Oct. 3	Plff's Notice of Appeal Re: Decision of Judge Connolly (Judgment)
1995 Oct. 5	Notice of Service of Notice of Appeal Re: The Honorable Thomas E. Connolly, Associate Justice of the Superior Court, Suffolk Superior Court, Court Room 906, New Court House, Boston, MA 02108-1701; George R. Suslak, Esq., John J. Lang, Esq., Suslak, Stanton & Lang, 200 Broadway, Box 1080, Lynnfield, MA 01940

1995 Oct. 18	Plaintiff Fred Davis informs Court by *telephone only* that he is not including a transcript to be included in the record for the Appeal

A True Copy:

Attest: _____
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth

At Boston.

In the case no. 95-P-1818

FRED DAVIS

vs.

HANOVER INSURANCE COMPANY.

pending in the Superior

Court for the County of Norfolk

Ordered, that the following entry be made in the docket:

Judgment affirmed.

by the Court,

/s/Nancy Turck Foley, Clerk.
Date June 14, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRED DAVIS, PLAINTIFF	)	
	)	
vs.	)	CIVIL
HANOVER INSURANCE	)	ACTION NO.
COMPANY JOHN F. O'BRIEN,	)	95-11837MLW
CHAIRMAN OF THE BOARD OF	)	
HANOVER INSURANCE, et al	)	
DEFENDANTS	)	
	)	

COMPLAINT

Parties

The plaintiff is a resident of Malden, Middlesex county, Massachusetts and a citizen of the United States.

The defendant Hanover Insurance Company principal place of business is located at Worcester, Massachusetts with offices throughout the United States of America.

The defendant John F. O'Brien is Chairman of the Board of Hanover Insurance Company Worcester, Worcester county, Massachusetts

Jurisdiction

State and Federal Constitutional Rights. Equal protection under the law.

Facts

September 20, 1991 the plaintiff, Fred Davis signed a release with Hanover Insurance for the sum of $20,000.00 for injuries he sustained in an automobile accident due to

the negligence of Anthony Lauria (Plaintiff's Exhibit "A" affixed to the Complaint).

Hanover Insurance Company accepted the plaintiff's release and kept, which is still in their possession.

Hanover Insurance Company failed to fulfill their obligation and did not pay the plaintiff.

Since Hanover Insurance Company refused to honor the contract, the plaintiff was compelled to file a breach of contract along with triple damages pursuant to Massachusetts Rule 93A in the Norfolk Superior Court.

In the course of proceedings the defendants filed a Summary Judgment, Judge Thomas Connolly ruled that the Summary Judgment was in favor of the defendants and they were not to take anything on the counterclaim.

January 21, 1994, plaintiff filed "Notice of Appeal" to the courts decision (Plaintiff's Exhibit "B" affixed to the Complaint).

The record was not assembled and forward to the Massachusetts Appeals Court.

Cause of Action

Violations of State and Federal Constitutional Rights: Equal protection of the law. Obstruction of justice.

January 21, 1994, plaintiff filed Notice of Appeal in the Norfolk Superior Court the court knowingly and willfully refused to assemble the record and forward it to the Massachusetts Court of Appeals.

The plaintiff has filed with the Norfolk Superior Court six notices For Immediate Assemble of the Record

(Plaintiff's Exhibit "C" affixed to the Complaint), however, it was to no avail. Plaintiff have exhausted all remedies in the Massachusetts Court System.

The plaintiff has been informed that both Judge Thomas Connolly and the defendant's attorney will not allow the record to be assembled and go to the Appeals Court because they don't want this case to go to the Massachusetts Appeal Court.

Therefore, the plaintiff is denied his right to appeal the court's decision.

Relief from the Court

The record to be assembled and forwarded to the Massachusetts Court of Appeals.

Damages for willfully preventing the plaintiff from the appeal process the sum of $85,000.00.

All Costs and legal fees which the court deems appropriate.

Punitive Damages the sum of $50,000, and any other relief the court deems appropriate.

Jury trial is requested.

/s/ _____

Fred Davis
P.O. Box 721
Everett, Ma 02149
(617) 322-8223